Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

FELIX DE LA CRUZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Where a Defendant enters a plea of guilty pursuant to a non-binding plea recommendation by the Government under Federal Rule of Criminal Procedure 11(e)(1)(B), does the failure of a trial court to admonish a Defendant, under Rule 11(e)(2), that he cannot withdraw his plea if the trial court does not accept the recommendation, result in reversible and harmful error?

LIST OF PARTIES IN THE COURT BELOW

The caption of the case in this Court contains the names of the parties to the proceedings in the United States Court of Appeals for the Seventh Circuit. In addition, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

Honorable Frances C. Hulin United States Attorney Central District of Illinois	Government
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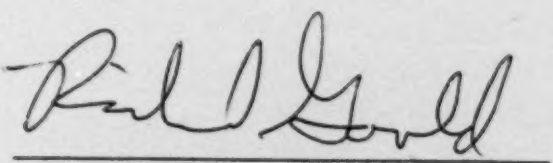
Honorable Richard B. Gould 4800 N. 10th, Suite F McAllen, Texas *Counsel of Record*	Petitioner
Honorable Al Alvarez 4409 N. McColl Road McAllen, Texas 78504	Petitioner



RICHARD B. GOULD

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UNITED STATES OF AMERICA, Respondent

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
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_____

COMES NOW, Felix De La Cruz, the Petitioner herein, and respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled cause on May 15, 1998.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at United States v. De La Cruz, 144 F.3d 492 (7th Cir. 1998). The May 15, 1997 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reprinted in the Appendix, subsection A to this Petition. References to the opinion will appear as follows: (App. A at p. 5; 144 F.3d at 494).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals" or "Seventh Circuit") was entered on May 15, 1998. No Petition for Rehearing was filed. This Petition was deposited in the mail within 90 days of the date of said judgment, i.e., on August 13, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Federal Rule of Criminal Procedure 11(e)(1)(B).

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following: . . . .

> **(B)** make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; . . .

Federal Rule of Criminal Procedure 11(e)(2).

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

STATEMENT OF THE CASE

The fundamental question in this case is whether the failure of the trial court to advise a defendant, who enters a plea of guilty pursuant to a non-binding recommendation by the Government under Federal Rule of Criminal Procedure 11(e)(1)(B), that he cannot withdraw his plea if the court does not accept the recommendation, is reversible and harmful error.

A. TRIAL COURT PROCEDURAL HISTORY

Petitioner, Felix De La Cruz was indicted on or about March 9, 1995, in cause number 95-20010 for violation of 21 U.S.C. 841(a)(1) and 846, the felony offense of Conspiracy to Distribute Marihuana. (1 R. Sec. 7, pp. 1-2).[1] On June 4,

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[1] Because of the manner in which the record was received by the undersigned, references to the record will be as follows:

(1 R. Item 43, -- p. 2)	Record, Volume 1, Item 43, page 2. This volume consists primarily of the pleadings in trial court cause number 95-20010 (conspiracy to distribute marihuana case), but also includes some transcripts of proceedings;

1996, Felix De La Cruz entered a plea of guilty to said charge. (1 R. Item 43, p. 2). On September 30, 1996, Felix De La Cruz failed to appear for sentencing. (3 R. 2-4). On or about February 19, 1997, De La Cruz was indicted in cause number 97-20010 for violation of 18 U.S.C. 3146(a)(1) and 3146(b)(1)(A)(ii) for Failure to Appear. (2 R. Item 1, p. 1). De La Cruz pled guilty to said charge on February 26, 1997. (3 R. 7).

On April 15, 1997, United States District Judge Harold A. Baker sentenced De La Cruz to 120 months confinement on the Conspiracy to Distribute Marihuana

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(2 R. Item 4, p. 2)	--	Record, Volume 2, page 2. This volume consists primarily of the pleadings in trial court cause number 97-20010 (failure to appear case);
(3 R. 3)	--	Transcript, page 3. This transcript contains three separate hearings: (1) September 20, 1996, regarding Appellant's failure to appear; (2) February 26, 1997, regarding a motion to continue final hearing and plea to failure to appear case; and (3) April 15, 1997, regarding sentencing;
(PSR 10)	--	Presentence Investigation Report, page 10.

charge, to run consecutively to a 15-month sentence on the Failure to Appear charge. (3 R. 102; 1 R. Item 59, p. 2). The court further ordered Appellant to pay a $15,000 fine on the Conspiracy to Distribute Marihuana case (3 R. 102), and ordered a five-year term of supervised release on the Conspiracy case to run concurrently with a three-year term on the Failure to Appear case. (3 R. 102). De La Cruz timely filed Notice of Appeal. (1 R. Item 63, 2 R. Item 4).

B. PLEA TO CONSPIRACY TO DELIVER MARIJUANA

During the plea proceedings in connection with the plea to the underlying offense (Conspiracy to Distribute Marijuana), held on June 4, 1996, the court asked whether or not Petitioner De La Cruz had any prior convictions, to which the Government responded he did not. (1 R. Item 43, pp. 2-3). The Government informed the court that there were 132 pounds (57 kilograms) involved. (1 R. Item 43, p. 3). The court inquired into the existence of any plea bargains. (1 R. Item 43, p. 7). Petitioner's counsel explained that the Government "would recommend the lower end of the guideline but that was not with respect to a written plea agreement." (1 R. Item 43, page 7). De La Cruz indicated he believed the applicable guideline sentence

to be in the range of 24 to 31 months. (1 R. Item 43, pp. 2-3). The Government interjected, "It's a level, with acceptance of responsibility, it would be a level 17, criminal history Category I." (1 R. Item 43, p. 8). The court asked De La Cruz whether he understood that the lawyers did not know for sure what the guideline sentence would be, but that the numbers just outlined were estimates. (1 R. Item 43, p. 8). The further asked De La Cruz whether he understood that what the Government recommended did not obligate the court to accept the recommendation. (1 R. Item 43, p. 8). Counsel for De La Cruz interjected that based upon the amount of marijuana involved, "we calculate that to be a level 20, which is 33 to 41 months. With acceptance of responsibility, he will receive three months [sic] which will bring it down to a level 17, which is 24 to 30 months." (1 R. Item 43, p. 8). The court then asked, and De La Cruz confirmed, his understanding that the minimum sentence was 24 months up to the upper end mentioned by his attorney. (1 R. Item 43, pp. 8-9). As a factual basis for the plea, counsel for the Government related to the court that Agent Bodemer and an informant had purchased 132 pounds of marijuana from Tijerina, Ramirez and Felix Solis (who was fugitive). (1 R. Item 43,

p. 12). The Government further told the court that Robert Kilcourse (a co-defendant) then contacted the informant that he was there to collect the $106,000 for the 132 pounds, that De La Cruz and Kilcourse later met the informant regarding the money, and that De La Cruz subsequently conferred with Bodemer, indicating he was collecting the money. (1 R. Item 43, pp. 12-13). The Government also related that De La Cruz discussed delivering more marijuana, but that he needed the money first. (1 R. Item 43, p. 13). Although the court referred to plea as an "open plea," at no time during the plea colloquy did the court inform De La Cruz that if the court did not follow the plea bargain, De La Cruz would not be entitled to withdraw his plea. (1 R. Item 43, pp. 2-15). After the plea, upon request by De La Cruz (1 R. Item 43, pp. 15-17), and over objection by the Government, (1 R. Item 43, p. 17, 18-19, 20-21, 23), the trial court released De La Cruz on bond pending sentencing. (1 R. Item 43, p. 23).

C. PSR OBJECTIONS AND FAILURE TO APPEAR

On August 30, 1996, De La Cruz, through counsel, filed his Objections to Presentence Investigation Report, with numerous factual objections, disputing much of the probation department's version of the facts contained in the

PSR. (1 R. Item 42, pp. 1-6). De La Cruz further objected that, although there was no written agreement, the prosecutor had met with defense counsel and De La Cruz, and agreed that if De La Cruz would plead to a conspiracy to deliver 57 kilograms, the prosecutor would not pursue any other allegations made by the co-defendant to investigators. (1 R. Item 42, p. 2). De La Cruz objected to being held accountable for an additional 700 to 1,000 pounds (1 R. Item 42, pp. 4-5), urging that the base offense level should be 20, with credit for acceptance of responsibility, yielding a total offense level of 17. (1 R. Item 42, p. 7).

On September 20, 1996, De La Cruz failed to appear at his sentencing hearing, and remained a fugitive for more than three months. (PSR 8; 3 R. 2-4). On February 26, 1997, De La Cruz entered an "open plea" of guilty for failure to appear. (3 R. 6-7, 11). De La Cruz related that when he received the "PSI" he was "flabbergasted" at the recommendation of the presentence investigator, that he disputed much of the information provided by Kilcourse, which was used in preparing the presentence report, and that he panicked. (3 R. 12). The Government contended that De La Cruz was a high-ranking member of a narcotics

organization in Texas and New Mexico, had fled to Mexico, and had to be lured back to be arrested. (3 R. 12-13). Counsel for De La Cruz asked for, and received, additional time before sentencing in order that he could review some tapes that had been provided by the Government, and so counsel could research the issue of whether De La Cruz could withdraw his plea, since this had originally been a plea bargain. (3 R. 16, 17-18).

D. SENTENCING

At the sentencing hearing on April 15, 1997, the Government urged that De La Cruz had violated the plea agreement, and sought to present evidence to support the Government's request for an upward departure. (3 R. 22-23). De La Cruz urged that the Government was breaching the plea agreement, and requested specific performance of the plea agreement. (3 R. 23). De La Cruz again objected to being held accountable for additional 700 to 1,000 pounds of marijuana, urging that the agreement was that he would plead guilty to an amount that would yield a base offense level 20, resulting in a sentence of no more than 24 to 31 months (with credit for acceptance of responsibility). (1 R. Item 42, p. 7; 3 R. 29). The Government urged that defense counsel had misinterpreted Rule 11(b) [sic], and

noted that the court was not limited to what was discussed during the plea, highlighting the fact that the court had said there were a lot of factors that would be involved in computing De La Cruz's sentence, depending upon what was disclosed through the PSR. (3 R. 35-36).

The court found, among other things, that (1) De La Cruz had pled without a written plea agreement, that the Government agreed to recommend a sentence at the low end of the Guidelines, that discussions were had concerning a minimum Guideline sentence of 24 and up to 31 months, that there was a specific admonition that the lawyers and the court did not know what the specific sentence would be, that the recommendation of the Government was not binding on the court, that the court did not know whether there was a meeting at which De La Cruz was promised a 24-month sentence, but in the absence of some proof offered on the subject, the court had to assume it did not occur (1 R. Item 62, p. 2); and (2) there was a factual basis for holding De La Cruz responsible for the 700 pounds.

The Government sought to present evidence that De La Cruz had breached the plea agreement, so the Government was no longer bound by the plea agreement, and could move the court to depart upward. (3 R. 46, 48-

50). Defense counsel urged this violated the plea agreement, and sought to withdraw his plea. (3 R. 51-52). This request was overruled. (3 R. 52).

After the Government presented its evidence, the court found De La Cruz had breached the plea agreement, based upon United States v. Ashurst, 96 F.3d 1055 (7th Cir. 1996) and United States v. Williams, 102 F.3d 923 (7th Cir. 1996) (3 R. 82-83), by failing to appear for sentencing, and engaging in a course of further criminal conduct by negotiating for the sale of controlled substances, similar to that with which he was charged, and the Government was relieved of its obligations under the agreement. (1 R. Item 62, p. 5). The Government requested the court to depart upward from the Guidelines because the Criminal History Category did not adequately reflect the seriousness of De La Cruz's past criminal history. (3 R. 83-88). Defense counsel again urged the Government was breaching the plea agreement, and requested that De La Cruz be permitted to withdraw his plea. (3 R. 88, 89). This request was denied.

E. APPELLATE COURT PROCEEDINGS

Petitioner filed a brief raising three issues.[2] On May 15, 1998, the Court of Appeals for the Seventh Circuit affirmed the conviction, holding, with respect to the issue that forms the basis for this Petition, that reversal was not required because (1) the trial court informed him that the 24-month sentence that had been discussed was merely an estimate, rather than an agreement by the Government to recommend 24 months; (2) the trial court discussed whether the plea was coerced, whether Petitioner understood the nature of the charges, and whether Petitioner understood the consequences of the plea; and (3) the trial court told

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[2] Petitioner raised the following issues: (1) Did the trial court improperly fail to admonish Appellant De La Cruz, pursuant to Rule 11(e)(2) that if it did not accept the plea bargain between the parties that Appellant De La Cruz would nevertheless not be permitted to withdraw his plea, resulting in reversible and harmful error?; (2) Did the trial court improperly find that Appellant De La Cruz breached his plea agreement, thus improperly releasing the Government from its burden of making certain recommendations to the trial court?; and (3) Did the trial court improperly add three points to the base offense level of Appellant De La Cruz for being a manager or supervisor? Petitioner is not raising the latter two issues in this Petition.

Petitioner about the possible 20-year maximum, Petitioner stated he understood, and the court explained it was not bound by the Government's recommendation. (App. A at p. 5; 144 F.3d at 494). The Court of Appeals further stated that Petitioner did not claim that he would not have entered a guilty plea if he had received the proper warning, rendering said error harmless, and citing United States v. Vaughn, 7 F.3d 1533, 1536 (10th Cir. 1993), cert. denied, 511 U.S. 1036, 114 S.Ct. 1553, 128 L.Ed.2d 201 (1994). (App. A. 144 F.3d at 494).

REASONS FOR GRANTING THE WRIT

1. Certiorari should be Granted to Resolve Conflicts in Principle Among the Lower Courts. Supreme Court Rule 10(a).

A. THE SEVENTH CIRCUIT'S HOLDING CONFLICTS WITH OTHER FEDERAL APPELLATE COURTS ON WHETHER THE FAILURE TO ADVISE A DEFENDANT WHO IS PLEADING GUILTY PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 11(e)(1)(B), THAT THE DEFENDANT CANNOT WITHDRAW HIS PLEA IF THE PLEA BARGAIN IS REJECTED, IS REVERSIBLE AND HARMFUL.

2. Certiorari should be Granted to Decide an Important Federal Question not Previously Decided by this Court. Supreme Court Rule 10(c).

A. THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Rule 11 of the Federal Rules of Criminal Procedure sets forth the procedures to be followed by a district court in accepting a plea of guilty or nolo contendere, and the types of pleas that can be entered. Rule 11(e)(1) provides that the government and the defendant may reach plea bargain agreements, in which the attorney for government will do one of the following: (A) move for dismissal of other charges (Rule 11(e)(1)(A); (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding on the court (Rule 11(e)(1)(B); or (C) agree that a specific sentence is the appropriate disposition of the case. If the agreement is of the type contemplated by Rule 11(e)(1)(B), a non-binding recommendation by the government, or non-binding

agreement not to oppose a particular request by a defendant, "the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea." Rule 11(e)(2). Rule 11(h) provides that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."

In order to satisfy the due process requirements of the Fifth Amendment, a defendant's guilty plea must be voluntary and intelligent. United States v. Graibe, 946 F.2d 1428, 1432 (9th Cir. 1991). As this Court has observed, the acceptance of a guilty plea requires the "utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." Graibe, 946 F.2d at 1432 (citing Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969)). If the defendant does not understand the scope of the prosecutorial promises, he cannot properly evaluate the risks inherent in the agreement. Graibe, 946 F.2d at 1432. An accused's plea of guilty can be voluntary only if he is fully aware of the direct consequences of his plea. Graibe, 946 F.2d at 1432. It is this informed voluntariness that Rule

11(e)(2) is designed to ensure. Graibe, 946 F.2d at 1432.

A review of pertinent case law reveals why the failure to provide the required admonishment, that Petitioner could not withdraw his plea if the trial court did not follow the plea bargain, was harmful in our case. For example, in United States v. Theron, 849 F.2d 477, 478 (10th Cir. 1988), the trial judge advised the defendant that the court could disregard the government's non-binding recommendation, and sentence the defendant as deemed appropriate, but the court failed to advise the defendant that if the court did not follow the government's recommendation, the defendant nevertheless had no right to withdraw the plea. Prior to sentencing, the defendant sought to withdraw his plea of guilty; said request was denied. Theron, 849 F.2d at 478. Noting that neither the defendant nor his counsel raised the issue of the trial court's failure to give the necessary admonition, the Tenth Circuit explained that the harm alleged in the trial court (the belief of the defendant that he would be guaranteed probation) was the type of harm that the Rule was designed to alleviate. Theron, 849 F.2d at 478. The Government contended on appeal that if the defendant and his counsel had been affected by the Rule 11 error, the defendant would

have said so in his motion to withdraw the plea. Theron, 849 F.2d at 479. Unconvinced, the court explained that while the defendant and his attorney may not have recognized the Rule 11 error, the defendant may have nevertheless been affected by the oversight. Theron, 849 F.2d at 479. In any event, the record affirmatively showed a number of instances suggesting that the defendant was confused about the nature of his plea. Theron, 849 F.2d at 479. In addition, the advisory committee note on the harmless error addition to Rule 11 (which occurred in 1983) states: "Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited. . . ." Theron, 849 F.2d at 479 (quoting Fed. R. Crim. P. 11 Advisory Committee Note (1983 Amendment). The failure of the trial court to provide the admonishment at issue was not one of those "limited situations." Theron, 849 F.2d at 480. Accordingly, the conviction and sentence were vacated, and the cause remanded. Theron, 849 F.2d at 480.

Faced with a practically identical situation, the Ninth Circuit rejected the Government's claim that such a failure to properly admonish the defendant constituted harmless error, noting that the number of violations of Rule 11 that

are harmless is limited:

> A defendant's choice between entering into a plea agreement with the government or proceeding to trial rests upon his calculation of the relative risks and benefits of each option. The degree of risk in accepting a plea agreement that specifies a sentence recommendation is directly related to the degree of discretion afforded a trial court in imposing a sentence greater than that settled upon by the parties. A defendant will undoubtedly have more concerns about accepting a plea agreement if the trial court has the discretion to bind him irrevocably to a higher sentence. . . . A fundamental consequence of a type (B) plea agreement [under Rule 11(e)(1)(B)] is that the defendant cannot withdraw his guilty plea. The district court may reject the recommended sentence and nonetheless bind the defendant to a higher sentence. Unlike other plea agreements made pursuant to Rule 11, type (B) agreements, once accepted by the court, foreclose forever the defendant's other options. When a defendant agrees to plead guilty under a type (B) agreement, the parameters of his fate have been set; no change of heart or dashing of expectations at the time of sentencing can undo his guilty plea.

United States v. Graibe, 946 F.2d 1428, 1431 (9th Cir. 1991); see also United States v. Iaquinta, 719 F.2d 83, 85 (4th Cir. 1983) (the defendant's conviction arising from a plea of guilty was reversed, notwithstanding an admonition that the trial court did not have to follow the recommendation of the Government, because same failed to substantially inform the defendant that he had no right to

withdraw his plea if the district court did not accept the sentencing recommendation).

Faced with similar situations, the Second, Sixth, Eighth and Eleventh Circuits have reached the same result. See United States v. DeBusk, 976 F.2d 300, 306-07 (6th Cir. 1992) (noting that the number of *harmless* Rule 11 violations was fairly limited, court reversed where trial court advised defendant it was not bound by sentencing recommendation, but *failed* to advise defendant that he could not withdraw his plea if court did not accept sentencing recommendation; further, the trial court had just advised defendant he could withdraw his plea if court rejected agreement); United States v. Zickert, 955 F.2d 665, 668-69 (11th Cir. 1992) (even though district court told defendant it was not bound by plea agreement, district court's failure to advise, prior to accepting negotiated plea, that defendant had no right to withdraw his plea if court rejected government's sentencing recommendation was reversible error, entitling defendant to relief from plea; district court failed to adequately advise defendant of consequences of plea, particularly in light of erroneous statement in plea agreement that defendant would have opportunity to withdraw plea if court rejected agreement);

United States v. Ferrara, 954 F.2d 103, 104-08 (2d Cir. 1992) (district court's rejection of plea agreement without warning to defendant that his guilty plea could not be withdrawn if government's recommendation was not followed, was reversible error, where there was confusion as to what was meant by statement that defendant's sentence would run concurrently with a sentence for a previous offense); United States v. Missouri Valley Construction, 704 F.2d 1026, 1030 (8th Cir. 1983) (although trial court told defendant it was not required to follow government's recommendation in plea agreement, the failure to advise defendant that it had a right to withdraw its plea prejudiced defendant, resulting in reversal of conviction with remand so that defendant could plead anew).

In our case, the trial court advised De La Cruz that it was not bound by the plea bargain, but failed to advise De La Cruz that he could not withdraw his plea if same was not accepted. At no other time, prior to learning that his sentence would be significantly higher than that originally anticipated, when it was too late to change his mind, was it learned that he would not be allowed to withdraw his plea. No plea documents or other items or explanations in the record ever advised De La Cruz to the contrary. When it

first became apparent that the court might not accept the plea bargain, at the hearing on February 26, 1997, counsel for De La Cruz asked for more time to research the question of whether the plea could be withdrawn. On April 15, 1997, when counsel for De La Cruz still entertained hopes that the court would hold the Government to its initial plea bargain, counsel requested specific performance. When it became evident that the court did not have any intention of holding the Government to the plea bargain, counsel for De La Cruz requested, on multiple occasions to be permitted to withdraw the plea. Said request was denied. Accordingly, the harm is readily apparent. The Seventh Circuit relied upon United States v. Vaughn, 7 F.3d 1533, 1536, (10th Cir. 1993), cert. denied, 511 U.S. 1036, 114 S.Ct. 1553, 128 L.Ed.2d 201 (1994), and United States v. Mitchell, 58 F.3d 1221, 1225 (7th Cir. 1995) to support the proposition that the trial court's failure to admonish Petitioner that he had no right to withdraw his plea in this case was harmless. Although the court in Mitchell, did state that the issues to be addressed on appeal dealt with two instances of alleged non-compliance with Rule 11, 58 F.3d at 1223, it is difficult, at best, to determine what exactly the defendant was complaining about, or what it was about the

record that did not demonstrate reversible error, such that the court did not have to "wade through the newfound formulations of harmless error." 58 F.3d at 1225. Further, in Mitchell, 58 F.3d at 1225-26, the court quoted extensively from United States v. Martirosian, 967 F.2d 1036 (5th Cir. 1992), a case that had been overruled by the Fifth Circuit almost two years before Mitchell was decided. See United States v. Johnson, 1 F.3d 296, 303 & n.32 (5th Cir. 1993). Similarly, the Seventh Circuit's reliance upon Vaughn, 7 F.3d at 1536, is misplaced. The Seventh Circuit stated that, as in Vaughn, "defendant does not claim that he would not have entered a guilty plea if he had received the proper warning." (App. A at p. 5; 144 F.3d at 494. In Vaughn, 7 F.3d at 1536, the defendant did not allege that he would not have entered a guilty plea if the court had given the proper warning. Instead, the defendant argued that he believed he could withdraw his plea at any time prior to sentencing if the court did not accept the Government's recommendation. Vaughn, 7 F.3d at 1536. Noting that it could not speculate or go beyond the record before it, the Tenth Circuit explained that Vaughn had failed to demonstrate that he would not have pled guilty if he had received the proper warning because "Vaughn did not move

to withdraw his plea at any time, even though the district court indicated it might have allowed a withdrawal after the appointment of replacement counsel." 7 F.3d at 1536. Unlike Vaughn, Petitioner asked on at least two separate occasions to be permitted to withdraw his plea, the very showing of harm that would have changed the result in Vaughn. And although Petitioner did not specifically state in his brief, or use the magical words, that he would not have pled guilty if the trial court had properly advised him that he could not withdraw his plea if the plea bargain was not followed, Petitioner clearly argued by implication that he would not have pled guilty if he had been properly informed, because Petitioner argued, and the record reflects, that on multiple occasions, Petitioner had tried to withdraw his plea. This was the very action that the Tenth Circuit in Vaughn required of the defendant in order to demonstrate that he would not have pled guilty if he had received the proper warning. 7 F.3d at 1536. Finally, the Seventh Circuit deemed it sufficient that the trial court explained that it was not bound by any governmental sentencing recommendation, and that the court could sentence Petitioner differently from the plea agreement. (App. A at p. 5; 144 F.3d at 494). However, one cannot assume that a

defendant pleading guilty with a non-binding sentencing recommendation knows that he cannot withdraw his plea if the court does not follow the recommendation. For example, in Texas, Petitioner's home state (PSR 8), when a defendant pleads guilty pursuant to a plea bargain, if the trial court does not follow the plea bargain, the court must allow the defendant the opportunity to withdraw his plea.[3] Even if it could not be said that Petitioner was relying upon Texas law regarding being permitted to withdraw his plea at the time he entered it, it is certainly reasonable for an uninformed defendant to believe he could withdraw his plea

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[3] Article 26.13(a)(2) of the Texas Code of Criminal Procedure (Vernon 1989) provides, in pertinent part, that "Prior to accepting a plea of guilty of a plea of nolo contendere, the court shall admonish the defendant of: . . .

(2) the fact that the recommendation of the prosecuting attorney as to punishment is not binding on the court. Provided that the court shall inquire as to the existence of any plea bargaining agreements between the state and the defendant and, in the event that such an agreement exists, the court shall inform the defendant whether it will follow or reject such agreement in open court and before any finding on the plea. *Should the court reject any such agreement, the defendant shall be permitted to withdraw his plea of guilty or nolo contendere*; (emphasis added).

if the court does not follow the agreement. It is reasonable for an uninformed defendant, especially one from Texas, to believe that it would be pointless to enter into a plea bargain with the Government if the court is not going to follow it anyway.

Because the plea on the failure to appear was connected to the plea to the conspiracy to deliver marijuana, both convictions should be vacated, and the cause remanded for De La Cruz to be allowed to replead. In the alternative, De La Cruz would urge that the cause be remanded for specific performance of the Government's obligation under the plea bargain, or that judgment be rendered by this Court enforcing the plea bargain. When one considers the number of authorities that disagree with the holding of the Seventh Circuit in this case, it becomes clear that this issue is one that is ripe for review by this Court. A decision by this Court would settle this important Federal issue, and would provide guidance to the Federal Courts of Appeals regarding harmless error analysis to be conducted in reviewing claims that the trial court failed to properly admonish a defendant prior to accepting a plea of guilty.

CONCLUSION

For the reasons stated, Petitioner prays this

Honorable Court GRANT the foregoing Petition for Writ of Certiorari, find that harmful error exists in this case, reverse the judgment of conviction, and remand for a new trial, or order specific performance of the plea bargain, or in the alternative, reverse the judgment affirming the conviction, and remand the cause with instructions to the Court of Appeals that said cause should be remanded for a new trial, or by ordering specific performance of the plea bargain.

Respectfully submitted,

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APPENDIX A

FILE

In the
United States Court of Appeals
For the Seventh Circuit

No. 97-2014

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FELIX DELACRUZ,

Defendant-Appellant.

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Appeal from the United States District Court
for the Central District of Illinois.
No. 95 CR 20010—**Harold A. Baker**, *Judge.*

ARGUED MARCH 31, 1998—DECIDED MAY 15, 1998

Before POSNER, *Chief Judge*, CUMMINGS and KANNE, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This case involves the transportation of marijuana from Texas to Illinois commencing in October 1994. Defendant Felix Delacruz was not involved until January 16, 1995.

On November 2, 1994, Felix Solis, Ignasio Ramirez and Raul Tijerina delivered 60 pounds of marijuana to undercover police officers in Kankakee, Illinois, for $48,000. On November 9 they delivered another 72 pounds of marijuana to the undercover police for $100,000. The sellers were unpaid on each occasion. The undercover police subsequently agreed to pay $100,000 on November 18, 1994, for the two deliveries. When Ramirez and Tijerina arrived for payment, they were arrested, while Solis was a fugitive.

On December 3, 1994, Robert Kilcourse traveled to Kankakee and demanded $106,000 for the 132 pounds of marijuana, but the undercover agents refused to pay and Kilcourse returned to Texas.

On January 16, 1995, defendant Felix Delacruz contacted one of the undercover agents and demanded the $106,000 allegedly owed Solis. In a series of telephone calls, defendant agreed to "front" another 400 pounds of marijuana if the undercover agents would pay the $106,000. Defendant said he would send Robert Kilcourse to collect the $106,000.

On February 8, 1995, Kilcourse was arrested and agreed to cooperate with the police. He said he had been recruited by defendant to travel through the United States to collect drug money. In the same month he picked up $65,000 in drug money and brought it to defendant, who arranged for him to deliver 700 to 1,000 pounds of marijuana in Illinois on March 16, 1995. Defendant obtained a credit card in Kilcourse's name and used it to finance Kilcourse's trips.

On June 4, 1996, defendant pled guilty to an indictment charging him and Kilcourse with conspiracy to distribute marijuana. The government agreed to recommend a sentence at the lower end of the guideline range. The district court advised defendant he faced a maximum penalty of 20 years' imprisonment. Judge Baker also explained the nature of the charge and the defendant's constitutional rights and asked defendant whether his plea was voluntary. Defendant stated that he understood everything. His counsel said that there was no written plea agreement but that the government was recommending a sentence at the lower end of the guideline range.

Upon inquiry from the court, the lawyers stated they believed the guideline sentence would be 24 to 31 months, but this was wrong because it did not take into account the additional 700 pounds of marijuana delivered in Illinois by Kilcourse or an additional three guideline levels for defendant's managerial role. Although defendant actually faced a guideline range of 70-87 months, the court explained

that the 24-31-month guideline range was the lawyers' estimate and that the court would not be bound by any sentence recommendation. The court did not tell defendant that he could not withdraw his plea if the court should not accept the sentencing recommendation. Thereupon defendant was released on bail and told to appear for sentencing on September 19, 1996.

The probation office then completed a presentence report including the 700 pounds of marijuana delivered by Kilcourse as relevant conduct and adding a three-level sentence enhancement in view of defendant's managerial role in a conspiracy involving five or more persons. Therefore Delacruz faced a guideline sentencing level of 29, yielding a range of 70 to 87 months. When he received the presentence report, defendant fled to Mexico.

When defendant had been in custody he met Guadalupe Presas, who was in jail for a drug crime. When Presas was released on probation he kept in touch with defendant. From Mexico defendant called Presas and discussed sending 500 pounds of marijuana to Arkansas. In the meantime, Presas had become an informant. In several subsequent recorded telephone calls from Presas to defendant in Mexico, Delacruz agreed to ship a large load of marijuana to the Danville, Illinois area. He told Presas they were sending a load of marijuana to Chicago but that he could divert it to Danville and could thereafter make a shipment of marijuana to Danville every 15 days. He agreed to ship 1,000 pounds of marijuana to Presas in Danville for $350,000.

On October 20, 1996, Presas called defendant, who told Presas that he should meet certain individuals at a Danville hotel and bring the $350,000 and obtain the marijuana. However, the negotiations terminated because Presas did not have the necessary money. When defendant was lured back from Mexico he was again jailed and told the police informant that he could provide him with 100 pounds of marijuana for $800 per pound while he was awaiting sentence and release a few months thereafter.

Defendant told the informant that he would deliver the marijuana to Chicago or Peoria.

On March 9, 1995, defendant was indicted for conspiring to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846. In February 1997 Delacruz was indicted for violating 18 U.S.C. §§ 3146(a)(1) and (b)(1)(A)(ii) by not appearing for sentencing. He pled guilty to both charges.

At the sentencing hearing, defendant objected to adding the 700 pounds of marijuana delivered by Kilcourse in Illinois pursuant to defendant's instructions, but the court overruled the objection. He also objected to his sentence being enhanced due to his role as a manager or leader in a conspiracy of five or more persons. That objection was rejected because the court considered the evidence to be clear and persuasive that defendant was a manager or supervisor in a conspiracy involving five or more participants. The court noted that defendant exerted significant control over Kilcourse. Defendant's request for an acceptance of responsibility reduction was denied because he had become a fugitive.

The district judge ruled that defendant had breached the original plea agreement providing for a 20-month sentence and therefore denied defendant's motion to require the government to abide by the original plea agreement. The defendant was sentenced to 120 months' imprisonment for conspiracy and another 15 months' imprisonment for his failure to appear.

Failure to comply with Rule 11 of Federal Rules of Criminal Procedure

In accepting defendant's guilty plea, the district court neglected to inform him that his plea could not be withdrawn if the district court did not accept the government's sentence recommendation. Rule 11(e)(2). However, the government never agreed to recommend a specific term of imprisonment but merely to recommend the lowest applicable

guideline sentence. As the court noted, defendant's and government counsel incorrectly estimated that the defendant would face a sentence of 24-31 months, but defendant was informed by the court that these were mere estimates rather than an agreement by the government to recommend a sentence of 24 months. In addition, the district judge did discuss whether the guilty plea was coerced, whether defendant understood the nature of the charges, and whether the defendant understood the consequences of the plea. After the district court discussed the conspiracy charge and the possible 20-year imprisonment term, defendant stated he understood those matters, and the court explained that it was not bound by any sentencing recommendation from the government. Consequently reversal is not required. *United States v. Mitchell*, 58 F.3d 1221, 1225 (7th Cir. 1995).

While it is true that the district court did not inform Delacruz that if it did not accept the sentence recommendation of the government, he would not be allowed to withdraw his guilty plea, nothing shows that if so informed, defendant would not have pled guilty. As in *United States v. Vaughn*, 7 F.3d 1533, 1536 (10th Cir. 1993), certiorari denied, 511 U.S. 1036, defendant does not claim that he would not have entered a guilty plea if he had received the proper warning. Thus any error on the court's part was harmless. In addition, the court explained that it was not bound by any governmental sentencing recommendation. Consequently defendant understood that he could be sentenced differently from the plea agreement. When he realized he might not receive a 24-month sentence, he fled to Mexico.

Since defendant breached the plea agreement, the government was not obligated to recommend the 24-month sentence

The defendant asserts that under the terms of the plea agreement, the government was obligated to recommend a 24-month sentence. However, the government did not

breach the plea agreement; rather Delacruz did so by not appearing for sentencing and continuing his criminal activity. While defendant was a fugitive in Mexico, he still conspired to distribute marijuana in Illinois. As in *United States v. Ashurst*, 96 F.3d 1055 (7th Cir. 1996), it was unreasonable for this defendant to believe that the government would be obligated to recommend an acceptance of responsibility reduction when he again committed the same crime. As in *United States v. Rivera*, 954 F.2d 122, 123 (2d Cir. 1992), certiorari denied, 503 U.S. 996, the government was not still obligated to recommend the lower range of the sentencing guidelines since defendant failed to appear for sentencing and continued to commit drug offenses. Delacruz could not reasonably expect the government to recommend the lower range of the sentencing guidelines when he fled to Mexico and was committing the same crime there.

Since defendant failed to appear for sentencing and continued his criminal conduct, the government was no longer obligated to recommend a sentence of 24 months at his sentencing hearing.

Three-level enhancement was properly based on defendant's managerial role in a conspiracy of five or more persons

Defendant claims he had no contract with his co-conspirators and did not exert any managerial role, so that the district court improperly enhanced his sentence. As the presentence report showed, defendant had four co-conspirators in delivering marijuana to Kankakee, Illinois: Eduardo Leal, Felix Solis, Ignasio Ramirez, and Raul Tijerina. Solis became manager of the group, b[illegible] when he became a fugitive Robert Kilcourse traveled to Kankakee to obtain payment for the marijuana that had been delivered to the undercover agents. Delacruz told the police agents that he had taken over for Solis and that he would send Kilcourse to pick up the money for the marijuana that had been delivered to the undercover agents. Therefore the conspiracy

involved five or more persons, with at least Kilcourse being managed by defendant. Since defendant did not challenge these allegations contained in the presentence report, the district court did not commit error in applying a three-level enhancement.

Judgment and sentence affirmed.

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Clerk of the United States Court of Appeals for the Seventh Circuit

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